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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 REYNALDO L. ISRAEL, JR.,

7 Plaintiff,

8 v.

9 MICHAEL J. ASTRUE, Commissioner of
10 Social Security,

11 Defendant.

Case No. 3:10-cv-05507-RBL-KLS

REPORT AND RECOMMENDATION

Noted for July 15, 2011

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16 Plaintiff has brought this matter for judicial review of defendant's denial of his
17 application for supplemental security income ("SSI") benefits. This matter has been referred to
18 the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR
19 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976).
20 After reviewing the parties' briefs and the remaining record, the undersigned submits the
21 following Report and Recommendation for the Court's review, recommending that for the
22 reasons set forth below, defendant's decision to deny benefits should be affirmed.
23

24 FACTUAL AND PROCEDURAL HISTORY

25 On April 30, 2008, plaintiff filed an application for SSI benefits, alleging disability as of
26 January 1, 2004, due to neck, back and shoulder problems, scoliosis, anxiety, depression and

1 agoraphobia. See Tr. 105, 125. His application was denied upon initial administrative review
2 and on reconsideration. See Tr. 56, 63. A hearing was held before an administrative law judge
3 (“ALJ”) on May 12, 2009, at which plaintiff, represented by counsel, appeared and testified, as
4 did a vocational expert. See Tr. 31-53. Also at that hearing, plaintiff amended his alleged onset
5 date of disability to April 1, 2008. See Tr. 46.

6
7 On May 22, 2009, the ALJ issued a decision in which plaintiff was determined to be not
8 disabled. See Tr. 19-30. Plaintiff’s request for review of the ALJ’s decision was denied by the
9 Appeals Council on May 22, 2010, making the ALJ’s decision defendant’s final decision. See Tr.
10 3; see also 20 C.F.R. § 416.1481. On July 20, 2010, plaintiff filed a complaint in this Court
11 seeking judicial review of defendant’s decision. See ECF #1-#3. The administrative record was
12 filed with the Court on October 1, 2010. See ECF #11. The parties have completed their
13 briefing, and thus this matter is now ripe for the Court’s review.

14
15 Plaintiff argues defendant’s final decision should be reversed and remanded for an award
16 of benefits, because the ALJ erred: (1) in evaluating the medical evidence in the record; (2) in
17 assessing plaintiff’s residual functional capacity; and (3) in finding him to be capable of
18 performing other jobs existing in significant numbers in the national economy. For the reasons
19 set forth below, however, the undersigned disagrees that the ALJ erred in determining plaintiff to
20 be not disabled, and therefore recommends that defendant’s decision be affirmed.

21 DISCUSSION

22
23 This Court must uphold defendant’s determination that plaintiff is not disabled if the
24 proper legal standards were applied and there is substantial evidence in the record as a whole to
25 support the determination. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986).
26 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

1 support a conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767
2 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. See
3 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F.
4 Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational
5 interpretation, the Court must uphold defendant's decision. See Allen v. Heckler, 749 F.2d 577,
6 579 (9th Cir. 1984).

7
8 I. The ALJ's Evaluation of the Medical Evidence in the Record

9 The ALJ is responsible for determining credibility and resolving ambiguities and
10 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).
11 Where the medical evidence in the record is not conclusive, "questions of credibility and
12 resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,
13 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v.
14 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining
15 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at
16 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls
17 within this responsibility." Id. at 603.

18
19 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
20 "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this
21 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
22 stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences
23 "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may
24 draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881
25 F.2d 747, 755, (9th Cir. 1989).
26

1 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
2 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
3 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can
4 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
5 the record.” Id. at 830-31.¹ However, the ALJ “need not discuss *all* evidence presented” to him
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7
8 ¹ Defendant argues that because Congress did not specifically prescribe standards for evaluating medical evidence in
9 disability decisions, but rather expressly delegated the authority to do so to defendant, and because defendant has not
10 promulgated regulations adopting the “clear and convincing” or “specific and legitimate” standards, but instead only
11 requires an ALJ to provide “good, specific reasons for the weight given a treating source’s opinion” (ECF #18, p. 9),
12 that regulatory language is controlling, and therefore this Court should ignore more than 35 years of binding Ninth
13 Circuit precedent. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005); Lester, 81 F.3d at 830-31; Baxter v.
14 Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989); Montijo v.
15 Secretary of Health & Human Services, 729 F.2d 599, 601 (9th Cir. 1984); Day v. Weinberger, 522 F.2d 1154, 1156
16 99th Cir. 1975). Defendant’s argument is not well-taken.

17 Defendant is correct in pointing out that the Social Security Act delegates to him the “full power and authority to
18 make rules and regulations . . . to . . . provide for the nature and extent of the proofs and evidence and the method of
19 taking and furnishing the same” in disability cases. 42 U.S.C. § 405(a). It is also true that where “Congress has
20 explicitly left a gap for [an administrative] agency to fill, there is an express delegation of authority to the agency to
21 elucidate a specific provision of the statute by regulation,” and therefore that such regulations “are given controlling
22 weight unless they are arbitrary, capricious, or manifestly contrary to the [delegating] statute.” Chevron v. Natural
23 Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). On that basis, defendant argues the “controlling”
24 regulatory language in 20 C.F.R. § 416.927(d)(2), which states that the Social Security Administration “will always
25 give good reasons in [its] notice of determination or decision for the weight [it] give[s the claimant’s] treating
26 source’s opinion,” conflicts with the Ninth Circuit’s standard for rejecting such evidence set forth above in Bayliss
and Lester, *et al.* See Social Security Ruling (“SSR”) 96-2p, 1996 WL 374188 *5 (“Paragraph (d)(2) of 20 CFR . . .
416.927 requires that the adjudicator will always give good reasons in the notice of the determination or decision for
the weight given to a treating source’s medical opinion(s).”).

There is no conflict here. As indicated, all that regulatory language requires is that “good reasons” be provided with
respect to explaining what weight such treating source opinions are given. This appears merely to be for the purpose
of making sure the administrative adjudicator’s determination is sufficiently explained to those who are tasked with
having to later review such determinations. See SSR 96-2p, 1996 WL 374188 *5 (“[T]he notice of the determination
or decision must contain specific reasons for the weight given to the treating source’s medical opinion, supported by
the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the
weight the adjudicator gave to the treating source’s medical opinion and the reasons for that weight.”) (emphasis
added). Indeed, the language of SSR 96-2p – i.e., the adjudicator must provide “specific” reasons in order to make
“clear” the weight being given a treating source’s medical opinion – echoes the “clear and convincing” and “specific
and legitimate” terminology employed by the Ninth Circuit.

Regardless, the fact that “good” reasons for the weight being given to treating medical source opinions is required to
be set forth in the administrative adjudicator’s decision, says nothing about the standard that must be met in order to
be able to reject such opinion evidence. Rather, 20 C.F.R. § 416.927(d)(2) and SSR 96-2p simply do not set forth
any specific requirement in regard to the latter, though arguably the rejection of such evidence can be seen as being
the same as giving it “no” weight. In any event, there is no question that a reason that is “specific and legitimate,”
let alone one that is “clear and convincing,” also constitutes a “good” reason for rejecting the opinion of a treating
medical source. Nor, apparently, has the Social Security Administration seen fit to define the term “good” here, in a
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1 or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984)
2 (citation omitted) (emphasis in original). The ALJ must only explain why “significant probative
3 evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981);
4 Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

5 In general, more weight is given to a treating physician’s opinion than to the opinions of
6 those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need
7 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
8 inadequately supported by clinical findings” or “by the record as a whole.” Batson v.
9 Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v.
10 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
11 2001). An examining physician’s opinion is “entitled to greater weight than the opinion of a
12 nonexamining physician.” Lester, 81 F.3d at 830-31. A non-examining physician’s opinion may
13 constitute substantial evidence if “it is consistent with other independent evidence in the record.”
14 Id. at 830-31; Tonapetyan, 242 F.3d at 1149.

17 A. Dr. McRae

18 Plaintiff challenges the following findings made by the ALJ:

19 I do not assign substantial weight to the opinion of [examining physician]
20 John McRae, Ph.D. Dr. McRae performed two psychological evaluations in
21 2005 on referral from [the Washington State Department of Social and Health
22 Services (“JDSHS”)]. On both occasions he opined that the claimant had
23 marked functional limitations (Exhibit 14F). However, this was largely based
on the claimant’s subjective report, which is not entirely credible. I further
note that Dr. McRae evaluated the claimant more than two years prior to the

24 manner that would indicate the Ninth Circuit’s standard conflicts with the statutory or regulatory framework in these
25 cases, or that the Social Security Administration otherwise heretofore has disagreed with it. Indeed, defendant has
26 not previously attempted to make the kind of argument he is making here, or if he has done so at any time during the
past 35 years, that attempt obviously has not been very successful. The undersigned presumes, furthermore, that the
Ninth Circuit was well aware of the Supreme Court’s decision in Chevron and its progeny, and the language of both
42 U.S.C. § 405(a) and 20 C.F.R. § 416.927(d)(2), in holding as it did in Bayliss, Lester and the like. Therefore, for
all of the above reasons, the undersigned rejects defendant’s argument here, as should the Court.

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1 current alleged disability onset date. Subsequent treatment records from
2 Comprehensive Mental Health show the claimant's symptoms improved with
psychotropic medication.

3 Tr. 28. While the undersigned finds that not all the reasons the ALJ gave here for rejecting the
4 opinion of Dr. McRae are valid, overall the ALJ's rejection thereof was proper.

5 Plaintiff is correct in pointing out the fact that Dr. McRea evaluated plaintiff more than
6 two years prior to his current alleged onset date of disability is irrelevant, given that plaintiff had
7 originally alleged an onset date of January 1, 2004, based on his claimed impairments, and that
8 the only reason that date was amended to April 1, 2008, is because that date is within "the month
9 of the SSI application." Tr. 46. In other words, the amended date appears to be based solely on
10 the fact that actual receipt of benefits, once eligibility therefor is granted, is based on the date of
11 application. see 42 U.S.C. § 1382(c)(7) (SSI benefits application of claimant who is found
12 eligible is effective on later of first day of month following date that application is filed, or first
13 day of month following date claimant becomes eligible for such benefits); see also 20 C.F.R. §
14 416.335 ("When you file an application in the month that you meet all the other requirements for
15 eligibility, the earliest month for which we can pay you benefits is the month following the
16 month you filed the application. If you file an application after the month you first meet all the
17 other requirements for eligibility, we cannot pay you for the month in which your application is
18 filed or any months before that month."). As such, Dr. McRae's opinions are still relevant in
19 regard to when plaintiff first became disabled, even though actual benefits are grantable therefor
20 beginning only much later.

21 The undersigned also agrees the ALJ erred in finding Dr. McRae's marked limitations to
22 be "largely based" on plaintiff's "subjective report, which is not entirely credible." Tr. 28. Each
23 of the evaluation forms completed by Dr. McRae was accompanied by a detailed narrative

1 report, containing not only Dr. McRae's own personal observations of plaintiff and diagnoses of
2 mental impairments, but also the results of both mental status examinations and psychological
3 testing performed at the time. See Tr. 350-363; Clester v. Apfel, 70 F.Supp.2d 985, 990 (S.D.
4 Iowa 1999) ("The results of a mental status examination provide the basis for a diagnostic
5 impression of a psychiatric disorder, just as the results of a physical examination provide the
6 basis for the diagnosis of a physical illness or injury.") Sprague v. Bowen, 812 F.2d 1226, 1232
7 (9th Cir. 1987) (opinion based on clinical observations supporting psychiatric diagnosis is
8 competent evidence); Sanchez v. Apfel, 85 F. Supp.2d 986, 992 (C.D. Cal. 2000) ("[W]hen
9 mental illness is the basis of a disability claim, clinical and laboratory data may consist of the
10 diagnoses and observations of professionals trained in the field of psychopathology.") (quoting
11 Christensen v. Bowen, 633 F.Supp. 1214, 1220-21 (N.D.Cal.1986)).
12

13 On the other hand, the ALJ was not remiss in rejecting Dr. McRae's opinion on the basis
14 that subsequent mental health treatment records revealed plaintiff's symptoms for the most part
15 "improved with psychotropic medication." Tr.28; see also Tr. 233, 235-36, 238, 240-42, 245-66,
16 307-08, 310-13, 315, 317-18, 372-76, 378. Plaintiff argues such improvement is reflected in Dr.
17 McRae's second evaluation report issued in mid-August 2005, in which plaintiff's concentration
18 and memory were noted to be improved, resulting in Dr. McRae finding plaintiff had a moderate
19 limitation in his ability to perform complex tasks (see Tr. 352, 356), not the marked limitation in
20 that area noted in his earlier evaluation (see Tr. 359).
21

22 This argument, however, fails to take into account the several marked mental limitations
23 Dr. McRae still found plaintiff had in mid-August 2005. See Tr. 352. In contrast, the subsequent
24 mental health treatment records paint a far less restricted functional picture. See Tr. 233 (denying
25 any current symptoms or other problems); 235 (no overt signs of psychosis); 307 (reporting only
26

1 some situational depression, denying hallucinations or delusions and appearing to be stable); 308
2 (denying any current illness symptoms); 311 (again reporting only some situational depression,
3 denying hallucinations or delusions and appearing to be stable with no overt signs of psychosis);
4 312-13 (same); 315 (denying any current illness symptoms); 317 (reporting doing better on
5 current medications, denying any increase in illness symptoms and looking stable with no overt
6 signs of psychosis); 318 (denying any current illness symptoms and reporting medications helped
7 with that); 372 (denying any delusional thinking, with no overt signs of psychosis); 373 (no overt
8 signs of psychosis); 374-76 (no overt signs of psychosis and stable on current medications); 378
9 (denying any delusional thinking, showing no overt signs of psychosis and remaining stable on
10 current medications).
11

12 In addition, the above mental health treatment records are dated well after Dr. McRae had
13 issued his evaluation reports, and therefore it is not possible that such improvement was reflected
14 in the later report. Accordingly, such subsequent medical evidence provided a sufficient basis on
15 which the ALJ could rely to reject the much more severely limited functional picture painted by
16 Dr. McCrae in his earlier evaluation reports. See Batson, 359 F.3d at 1195 (ALJ need not accept
17 opinion of treating physician if that opinion is inadequately supported by record as whole); see
18 also Thomas, 278 F.3d at 957; Tonapetyan, 242 F.3d at 1149. Thus, although the other reasons
19 the ALJ gave for rejecting Dr. McRae's opinions are not valid, this last reason alone constitutes a
20 sufficient basis for doing so.
21

22
23 B. Dr. Mangione-Lambie

24 Plaintiff also challenges the ALJ's following additional findings:

25 I do not assign significant weight to the opinion of [examining psychologist]
26 Dr. [Mary G.] Mangione-Lambie[, Ph.D.] (Exhibit 2F). She saw the claimant
on only one occasion for a disability evaluation and largely relied on the
claimant's subjective report, which is not entirely credible. The claimant did

1 not know who she was, when queried at the hearing. [Non-examining
2 psychologist] Dr. [Leslie] Postovoit[, Ph.D.,] noted that the claimant
3 misrepresented his living situation at that evaluation. The claimant told Dr.
4 Mangione-Lambie that he lived in the woods since 2004. However, the
5 claimant's brother reported the claimant was living in a shelter, which is a
6 crowded social setting. As noted by [non-examining psychologist] Dr.
7 [Kristine] Harrison[, Psy.D.], Dr. Mangione-Lambie diagnosed a delusional
8 disorder, which is not supported by the treatment records from
Comprehensive Mental Health. Psychiatric diagnosis is based primarily on an
individual's self report. If an individual exaggerates symptoms, the
conclusions reached are inaccurate and unreliable. I note the claimant
performed well on mental status examination at that evaluation. I find the
opinion of Dr. Mangione-Lambie has no merit.

9 Tr. 28. Specifically, plaintiff argues the fact that Dr. Mangione-Lambie evaluated him only once
10 is not a valid basis for rejecting her opinion. The undersigned agrees, given that by definition an
11 examining medical source generally will only evaluate a claimant at most once or twice. The
12 undersigned further notes that defendant himself often has based determinations of non-disability
13 solely or in part on such one-time evaluations.

14
15 In addition, plaintiff again correctly notes Dr. Mangione-Lambie did not appear to base
16 her opinion largely on plaintiff's own self-report, since her evaluation report indicates that in
17 addition to relying on that report, Dr. Mangione-Lambie recorded her personal observations of
18 plaintiff, assessed specific diagnoses and conducted a mental status examination. See Tr. 195-
19 201; see also Sanchez, 85 F. Supp.2d at 992 (when mental illness is basis of disability claim,
20 clinical and laboratory data may consist of diagnoses and observations of professionals trained in
21 field of psychopathology); Sprague, 812 F.2d at 1232 (opinion based on clinical observations
22 supporting psychiatric diagnosis is competent evidence); Clester, 70 F.Supp.2d at 990 (results of
23 mental status examination provide basis for diagnostic impression of psychiatric disorder, just as
24 results of physical examination provide basis for diagnosis of physical illness or injury). Nor
25 does it seem that plaintiff misrepresented his living situation, given that Dr. Mangione-Lambie
26

1 noted the fact that he lived at a shelter in her evaluation report. See Tr. 200-01.

2 Nevertheless, once more despite the above errors, the ALJ did provide at least one proper
3 reason for discounting Dr. Mangione-Lambie’s opinion, namely that plaintiff “performed well on
4 [the] mental status examination.” Tr. 28; see also Batson, 359 F.3d at 1195 (ALJ need not accept
5 opinion of even treating physician if that opinion is inadequately supported by clinical findings);
6 see also Thomas, 278 F.3d at 957; Tonapetyan, 242 F.3d at 1149. Plaintiff argues this does not
7 justify the ALJ’s rejection of Dr. Mangione-Lambie’s opinion, given that Dr. Mangione-Lambie
8 herself recognized plaintiff performed well in finding him to be not limited in understanding,
9 remembering and following simple tasks, and only mildly limited with respect to understanding,
10 remembering and following complex tasks and learning new tasks. See Tr. 197. However, that
11 performance – and Dr. Mangione-Lambie’s recognition thereof – does not account for the other
12 moderate, marked and severe mental functional limitations she found. See id.

13 The undersigned also disagrees with plaintiff that the ALJ erred in rejecting the diagnosis
14 of delusional disorder, given that no other medical source in the record – including Dr. McRae
15 and, as noted by the ALJ, plaintiff’s mental health treatment providers – has made that diagnosis.
16 See Tr. 203, 210, 261-62, 265, 351, 355-56, 358, 363. It is true that Dr. Harrison assessed him
17 with a diagnosis of “possible” delusional disorder (see Tr. 274), but that is not the same thing as
18 diagnosing an actual delusional disorder. Accordingly, the undersigned finds that overall the
19 ALJ did not err in rejecting Dr. Mangione-Lambie.

20 II. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity

21 If a disability determination “cannot be made on the basis of medical factors alone at step
22 three of the evaluation process,” the ALJ must identify the claimant’s “functional limitations and
23 restrictions” and assess his or her “remaining capacities for work-related activities.” Social
24

1 Security Ruling (“SSR”) 96-8p, 1996 WL 374184 *2. A claimant’s residual functional capacity
2 (“RFC”) assessment is used at step four to determine whether he or she can do his or her past
3 relevant work, and at step five to determine whether he or she can do other work. See id. It thus
4 is what the claimant “can still do despite his or her limitations.” Id.

5 A claimant’s residual functional capacity is the maximum amount of work the claimant is
6 able to perform based on all of the relevant evidence in the record. See id. However, an inability
7 to work must result from the claimant’s “physical or mental impairment(s).” Id. Thus, the ALJ
8 must consider only those limitations and restrictions “attributable to medically determinable
9 impairments.” Id. In assessing a claimant’s RFC, the ALJ also is required to discuss why the
10 claimant’s “symptom-related functional limitations and restrictions can or cannot reasonably be
11 accepted as consistent with the medical or other evidence.” Id. at *7.

12 In this case, the ALJ assessed plaintiff with the residual functional capacity to “**perform**
13 **light work,**” but found that he would be “**unable to reach overhead bilaterally,**” that he could
14 “**reach to chest level,**” that he “**should not work with the public or around children,**” and that
15 he could “**perform simple and detailed tasks.**” Tr. 24 (emphasis in original). Plaintiff does not
16 agree with the above RFC assessment, arguing the ALJ erred in failing to make that assessment
17 in relation to the moderate difficulties the ALJ found he had in the domains of social functioning
18 and concentration, persistence or pace at step two and step three of the sequential disability
19 evaluation process.

20 Defendant employs a five-step “sequential evaluation process” to determine whether a
21 claimant is disabled. See 20 C.F.R. § 416.920. At step two thereof, the ALJ must determine if an
22 impairment is “severe.” Id. At step three of the evaluation process, the ALJ must evaluate the
23 claimant’s impairments to see if they meet or medically equal any of the impairments listed in 20

1 C.F. R. Part 404, Subpart P, Appendix 1 (the “Listings”). See 20 C.F.R § 416.920(d); Tackett v.
2 Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). To support his argument here, plaintiff relies on the
3 language of 20 C.F.R. § 416.920a(d), which provides in relevant part that:

4 . . . After we rate the degree of functional limitation resulting from your
5 impairment(s), we will determine the severity of your mental impairment(s).

6 (1) If we rate the degree of your limitation in the first three functional
7 areas [of activities of daily living, social functioning and concentration,
8 persistence or pace (see 20 C.F.R. § 416.920a(c)(3))] as “none” or “mild”
9 and “none” in the fourth area [of episodes of decompensation (see id.)],
we will generally conclude that your impairment(s) is not severe, unless
the evidence otherwise indicates that there is more than a minimal
10 limitation in your ability to do basic work activities (see § 416.921).

11 (2) If your mental impairment(s) is severe, we must then determine if it
12 meets or is equivalent in severity to a listed mental disorder. We do this
13 by comparing the medical findings about your impairment(s) and the
14 rating of the degree of functional limitation to the criteria of the
15 appropriate listed mental disorder. We will record the presence or absence
16 of the criteria and the rating of the degree of functional limitation on a
standard document at the initial and reconsideration levels of the
administrative review process, or in the decision at the administrative law
judge hearing and Appeals Council levels (in cases in which the Appeals
Council issues a decision). . . .

17 (3) If we find that you have a severe mental impairment(s) that neither
18 meets nor is equivalent in severity to any listing, we will then assess your
residual functional capacity.

19 The undersigned agrees with defendant that nothing in this regulatory language requires the ALJ
20 to include moderate mental functional limitations in the RFC assessment, even though moderate
21 limitations may be found in the functional domains considered at steps two and three of the
22 sequential disability evaluation process. Simply, the determinations at step two and step three
23 are separate and distinct from the residual functional capacity assessment employed at steps four
24 and five. Indeed, SSR 96-8p, expressly provides in relevant part:

25 . . . The psychiatric review technique described in . . . [20 C.F.R. §] 416.920a
26 . . . requires adjudicators to assess an individual’s limitations and restrictions

1 from a mental impairment(s) in [the four functional areas noted above in §
2 416.920a(c)(3), known also as the “paragraph B” criteria]. The adjudicator
3 must remember that the limitations identified in the “paragraph B” . . .
4 criteria are *not* an RFC assessment but are used to rate the severity of mental
5 impairment(s) at steps 2 and 3 of the sequential [disability] evaluation
6 process. The mental RFC assessment used at steps 4 and 5 of the sequential
7 evaluation process *requires a more detailed assessment* by itemizing various
8 functions contained in the broad categories found in [the “paragraph B”
9 criteria].

10 1996 WL 374184 *4 (emphasis added). Accordingly, the ALJ was not required to include in his
11 assessment of plaintiff’s residual functional capacity moderate limitations in social functioning
12 or in concentration, persistence or pace, merely because he determined that moderate difficulties
13 existed in those areas at steps two and three.

14 Plaintiff goes on to argue that the ALJ further erred by failing to include all of the mental
15 functional limitations found by Dr. Harrison. In terms of Dr. Harrison’s findings and evaluation
16 report, the ALJ stated as follows:

17 . . . [Dr.] Harrison . . . opined that the claimant could understand, remember,
18 and complete simple and some familiar complex tasks through a normal
19 week. However, she did not think the claimant could perform complex tasks
20 on a consistent basis. Dr. Harrison thought the claimant should not interact
21 extensively with the public, children, or other vulnerable individuals. She
22 thought the claimant could interact appropriately with supervisors and a few
23 coworkers. Dr. Harrison thought the claimant would need guidance with
24 complex, important plans and decisions (Exhibit 9F). I assign significant
25 weight to the opinion of Dr. Harrison. Although she did not examine the
26 claimant, she is an expert in evaluating the psychological issues in disability
claims before the Social Security Administration and her opinion is
appropriately accorded weight . . .

Tr. 27. Plaintiff asserts the ALJ erred here by not including all of the mental limitations that Dr.
Harrison checked in the state agency mental residual functional capacity assessment (“MRFCA”)
form she completed. See Tr. 268-69.

Defendant argues it is the narrative section contained in Section III of that form – titled
“FUNCTIONAL CAPACITY ASSESSMENT” (see Tr. 270) – rather than the individual mental
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1 functional limitations set forth in check-box form in Section I thereof (see Tr. 2698-69) – titled
2 “SUMMARY CONCLUSIONS” – that the ALJ is to consider. In reply thereto, plaintiff cites a
3 prior ruling in Hartman v. Astrue, Case No. 3:07-cv-05644-KLS, in which the undersigned stated
4 in relevant part as follows:

5 Plaintiff . . . argues that the ALJ failed to give any reasons for not
6 adopting the other moderate limitations noted . . . in Section I [of the MRFCA
7 form]. . . . [T]he undersigned agrees. The lack of any rationale for rejecting
8 those limitations was error. Defendant argues plaintiff’s argument is
9 misplaced, because section I of the form – wherein those moderate limitations
10 are noted – is not the assessment of her mental residual functional capacity.
11 Instead, relying on the Social Security Administration’s Program Operations
12 Manual System (“POMS”), defendant asserts that it is section III . . . [,] which
13 constitutes that assessment, and the ALJ thus properly did not include any
14 limitations from section I.

15 The undersigned disagrees with defendant’s position. The POMS does
16 provide in relevant part as follows:

17 **NOTE:** The purpose of section I (“Summary Conclusion”) . . .
18 is chiefly to have a worksheet to ensure that the psychiatrist or
19 psychologist has considered each of these pertinent mental
20 activities and the claimant’s . . . degree of limitation for
21 sustaining these activities over a normal workday and
22 workweek on an ongoing, appropriate, and independent basis.
23 **It is the narrative** written by the psychiatrist or psychologist
24 **in section III** (“Functional Capacity Assessment”) . . . **that**
25 **adjudicators are to use as the assessment of RFC.**
26 Adjudicators must take the RFC assessment **in section III** and
decide what significance the elements discussed in this RFC
assessment have in terms of the person’s ability to meet the
mental demands of past work or other work. This must be
done carefully using the adjudicator’s informed professional
judgment.

27 POMS DI 25020.010(B)(1), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425020010!opendocument> (emphasis in original). In addition, it is true that
28 even though it “does not have the force of law,” the Ninth Circuit has
29 recognized the POMS as constituting “persuasive authority.” Warre v.
30 Commissioner of Social Sec. Admin., 439 F.3d 1001, 1005 (9th Cir. 2006).

31 Nevertheless, while the POMS may govern how an ALJ is to view the
32 [MRFCA form] – and may be taken into consideration by the Court in
33 evaluating the ALJ’s treatment thereof as well – this does not mean the
34 evaluating psychologists themselves felt that they were governed by it or took

1 it into consideration in making their findings. That is, as pointed out by
2 plaintiff, section III of the form directs the evaluator to elaborate and explain
3 the summary conclusions they drew in regard to the limitations noted in
4 section I. There is no direction given on that form to indicate to the evaluator
5 that he or she should treat section III as constituting the claimant's sole and
6 entire mental residual functional capacity. Accordingly, it is not at all clear
7 that [those evaluators] intended their section I findings to be ignored or not
8 considered. While certainly this discrepancy between the POMS and the
9 language of the form itself may create some difficulties for the ALJ in
10 determining how to go about evaluating such evidence, that is an issue for the
11 Social Security Administration to resolve, and not a valid reason to discount
12 potentially significant probative findings.

13 Id., ECF # 18, pp. 7-8.

14 Plaintiff also points to the undersigned's Report and Recommendation in Gibbs v. Astrue,
15 Case No. 3:09-cv-05114-RJB, in which defendant's argument that it is the MRFCA form's
16 Section III to which the ALJ's RFC assessment should be compared was rejected, because
17 defendant provided "no legal basis for why this should be so, or why the statements contained in
18 the narrative section are more credible or reliable" than the checked-off limitations contained in
19 Section I, and because to the extent ALJ actually relied on Section III, he did not explain why he
20 did so. Id., ECF #27, p. 11. In upholding the undersigned's findings in Gibbs, the Court further
21 stated in relevant part as follows:

22 Defendant asserts that the [MRFCA] form . . . [was] correctly
23 completed in accordance with the instructions printed on the form, and that
24 the ALJ correctly interpreted the form. . . . The Defendant states that the ALJ
25 relied on . . . and . . . incorporated the opinions written in the "Functional
26 Capacity Assessment" section for the form, also referred to as the narrative
section in this order, into his residual functional capacity finding. . . . Thus,
the Defendant argues, the ALJ interpreted the form consistent with the
instructions printed on the form. . . .

Defendant also argues that the Report and Recommendation would
require that the ALJ adopt the moderate limitations identified in the
"Summary Conclusions" section, which would be a misinterpretation of the
form. . . .

Plaintiff contends that the Report and Recommendation is correct and
that the Defendant has failed to show how the narrative portion of the report

1 incorporated each of the . . . limitations [checked off in the “Summary
2 Conclusions” of the MRFC form]. . . .

3 The Defendant’s argument is not persuasive. First, the Report and
4 Recommendation does not require the ALJ to “adopt” the moderate
5 limitations identified in the “Summary Conclusions” section. The Report and
6 Recommendation states the ALJ’s “assessment fails to adequately account for
7 a number of [the] limitations . . . found.” . . . The Report and
8 Recommendation only requires that the moderate limitations be addressed by
9 the ALJ, which was not done in this case. It does not require that the ALJ
10 “adopt” or “incorporate” the Summary Conclusions section into his findings.

11 Second, the Report and Recommendation does not misinterpret the
12 form. The narrative section instructions explicitly states, “Explain your
13 summary conclusions in narrative form.” . . . The two sections, the “summary
14 conclusions” and “functional capacity assessment” or narrative section, are
15 inextricably linked. [The evaluators who completed the form] failed to
16 adequately explain the summary conclusions in the narrative section of the
17 form. Therefore, it would have been error for the ALJ to adopt the statements
18 in the narrative section of the form without explanation, when the narrative
19 section did not explain the summary conclusions. The ALJ need not adopt the
20 summary conclusions as findings, but the ALJ should have, at the least,
21 explained the deficiencies in the narrative section in relation to the summary
22 conclusions.

23 Id., ECF #32, pp. 5-6.

24 Accordingly, given the Court’s above prior determinations regarding this issue, plaintiff
25 argues the ALJ was required to address the limitations checked off by Dr. Harrison in Section I
26 of the MRFC form. The undersigned does acknowledge the approach the Court has taken in the
above cases in regard to that form. Further, more recently in Charron v. Astrue, Case No. 3:10-
cv-05489-RBL, the undersigned again addressed this issue, stating in relevant part:

. . . Citing to the . . . POMS . . . , defendant argues the ALJ did not
have to adopt the . . . limitations checked in Section I of the MRFC [form].
It is true that the POMS provides in relevant part as follows:

NOTE: The purpose of section I (“Summary Conclusion”) . . .
is chiefly to have a worksheet to ensure that the psychiatrist or
psychologist has considered each of these pertinent mental
activities and the claimant’s . . . degree of limitation for
sustaining these activities over a normal workday and
workweek on an ongoing, appropriate, and independent basis.
It is the narrative written by the psychiatrist or psychologist

1 in section III (“Functional Capacity Assessment”) . . . **that**
2 **adjudicators are to use as the assessment of RFC.**

3 Adjudicators must take the RFC assessment **in section III** and
4 decide what significance the elements discussed in this RFC
5 assessment have in terms of the person’s ability to meet the
6 mental demands of past work or other work. This must be
7 done carefully using the adjudicator’s informed professional
8 judgment.

9 POMS DI 25020.010(B)(1), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425020010!opendocument> (emphasis in original). It is true as well that the
10 Ninth Circuit has recognized the POMS as “persuasive authority,” even
11 though it “does not have the force of law.” Warre v. Commissioner of Social
12 Sec. Admin., 439 F.3d 1001, 1005 (9th Cir. 2006). But it is not entirely clear
13 that the narrative statements contained in Section III are to be adopted to the
14 complete exclusion of the summary conclusions contained in Section I, rather
15 than to be read merely as an explanation thereof. In any event, the ALJ did not
16 make clear that this is what he was doing, and so remand for clarification of
17 this is required.

18 Id., ECF #18, p. 8 (internal footnote omitted).

19 In Thompson v. Astrue, Case No. 3:09-cv-05792-RBL, though, the undersigned, without
20 reference to those prior determinations, found as follows in regard to the MRFC form:

21 Plaintiff argues the ALJ erred in failing to specifically discuss or state
22 any reason for not adopting the . . . mental functional limitations . . . checked
23 off in Section I . . . of the [MRFCA] form . . . Instead, the ALJ looked to the
24 explanation of [the] Section I “summary conclusions” that [was] provided in
25 “narrative form” in Section III . . . of that same form. Plaintiff argues the ALJ
26 was required to consider all the findings . . . provided [in the MRFCA form],
including the limitations checked in Section I.

The undersigned agrees with defendant, however, that pursuant to the
directive contained in the . . . POMS . . . , “[i]t is the narrative written by the
psychiatrist or psychologist **in [S]ection III . . . that adjudicators are to use**
as the assessment of RFC.” POMS DI 25020.010(B)(1)[, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425020010!opendocument>] (emphasis in original).
It is true, as plaintiff notes, that the POMS “does not have the force of law.”
Warre v. Commissioner of Social Sec. Admin., 439 F.3d 1001, 1005 (9th Cir.
2006). Nevertheless, the POMS has been recognized as “persuasive
authority” in the Ninth Circuit. Id. Nor does the undersigned find or plaintiff
provide any valid reasons for not following that directive in this case.

Plaintiff argues the same POMS section provides that the functional
abilities set forth in Section I are the mental abilities needed for any job, and
that the psychologist completing an RFC assessment must complete Section I

1 to ensure they have considered each of those mental abilities. See POMS DI
2 25020.010(B)(1), (2)[, [https://secure.ssa.gov/apps10/poms.nsf/Inx/](https://secure.ssa.gov/apps10/poms.nsf/Inx/0425020010)
3 0425020010]. But neither of these provisions is inconsistent with the
4 requirement that the adjudicator – in this case the ALJ – look to Section III,
5 and not Section I, for the psychologist’s RFC assessment. Plaintiff posits
6 there is nothing to indicate [the evaluator who completed the form] actually
7 considered and took into account all the limitations he checked in Section I,
8 but it would be unreasonable to assume the opposite: that is, that even though
9 all of those boxes had been checked, [the evaluator] did not even consider or
10 take them into account when he then went on to complete Section III.

11 Id., ECF #27, pp. 12-13 (internal footnotes omitted). The Court then adopted this determination,
12 but without comment. See id., ECF #28.

13 Most recently, noting the conflict between the undersigned’s determination in Thompson
14 and the prior determination in Charron, the Court declined to adopt the undersigned’s reasoning
15 employed in Charron, explaining in relevant part as follows:

16 The MRFCFA . . . form . . . contains three sections: (I) Summary
17 Conclusions; (II) Remarks; and (III) Functional Capacity Assessment,
18 describing a claimant’s work-related limitations in a narrative. The . . . POMS
19 . . . instructs ALJs to focus on the narrative contained in Section III of the
20 MRFCFA [form]. The POMS indicates that the purpose of Section I is to
21 provide the psychologist or psychiatrist with a worksheet to insure that each of
22 the listed mental activities has been considered in determining the claimant’s
23 residual functional capacity (“RFC”).

24 Here, Judge Strombom recommended reversal based in part upon the
25 ALJ’s failure to adopt the . . . limitations . . . noted in Section I of the MRFCFA
26 [form]. That recommendation was based upon Judge Strombom’s reasoning
that “it is not entirely clear that the narrative statements contained in Section
III are to be adopted to the complete exclusion of the summary conclusions
contained in Section I, rather than to be read merely as an explanation
thereof.” . . . Judge Strombom recommended that this matter be reversed
because “the ALJ did not make clear that this was what he was doing, and so
remand for clarification of this is required.” . . .

27 The Commissioner urges that the correct analysis of the interaction
28 between Section I and Section III is that found in *Thompson v. Astrue*, No.
29 C09-5792RBL. There, in responding to a challenge that the ALJ failed to take
30 into account or discuss . . . limitations noted in Section I, the Magistrate Judge
emphasized that it is the narrative in Section III that controls. Further, the
Magistrate Judge found that Section I limitations noted did not need to be
discussed by the ALJ because it is reasonable to assume that the psychologist
included the Section I limitations in completing Section III. . . .

1 The Court agrees with the Commissioner. The better analysis is that
2 found in *Thompson*. Therefore, the ALJ did not err by failing to include in
3 claimant's RFC [the limitation contained in Section I of the MRFC form
4 sought to be included therein].

5 Charron, Case No. 3:10-cv-05489-RBL, ECF #20, pp. 2-3. Having considered all of the above
6 determinations on this issue, as well as the MRFC form itself and the express language of the
7 POMS, the undersigned agrees with the Court's holding in Charron – and the undersigned's own
8 reasoning in Thompson – that it is the narrative in Section III of the MRFC that controls, and
9 thus that the ALJ is not required to specifically address the limitations checked off in Section I.
10 The undersigned therefore finds the ALJ did not err in failing to expressly address the limitations
11 Dr. Harrison checked off in Section I of the MRFC form.

12 III. The ALJ's Findings at Step Five

13 If a claimant cannot perform his or her past relevant work, at step five of the disability
14 evaluation process the ALJ must show there are a significant number of jobs in the national
15 economy the claimant is able to do. See Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 416.920(d),
16 (e). The ALJ can do this through the testimony of a vocational expert or by reference to
17 defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at 1100-1101;
18 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

19
20 An ALJ's findings will be upheld if the weight of the medical evidence supports the
21 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);
22 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony
23 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See
24 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the
25 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.
26

(citations omitted). The ALJ, however, may omit from that description those limitations he or she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

At the hearing, the ALJ posed a hypothetical question to the vocational expert containing substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual functional capacity. See Tr. 47. In response thereto, the vocational expert testified that there were other jobs an individual with the same limitations – and with the same age, education and work background as plaintiff – would be able to do. See Tr. 47-49. Based on the vocational expert's testimony, the ALJ found plaintiff to be capable of performing other jobs existing in significant numbers in the national economy. See Tr. 29-30.

Plaintiff argues that because the ALJ erred in evaluating the medical evidence in the record, and thus in assessing his residual functional capacity, the hypothetical question he posed to the vocational expert does not accurately describe his functional limitations, and therefore the ALJ's step five determination cannot be upheld. But because the ALJ did not err as plaintiff argues in regard to evaluating the medical evidence in the record or in assessing plaintiff's RFC, the ALJ also did not err here at step five.

CONCLUSION

Based on the foregoing discussion, the Court should find the ALJ properly concluded plaintiff was not disabled. Accordingly, the Court should affirm defendant's decision to deny benefits.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b), the parties shall have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn,

1 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk
2 is directed set this matter for consideration on **July 15, 2011**, as noted in the caption.

3 DATED this 27th day of June, 2011.
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6 
7 Karen L. Strombom
8 United States Magistrate Judge
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